Supreme Court, U.S.
FILED
AUG 30 2000
CLERK

No. 00-165

IN THE

Supreme Court of the United States

AYLEEN JAMES,

Petitioner,

v.

NEWSWEEK, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Respondent Newsweek, Inc. ("Newsweek") hereby discloses that it is a wholly owned subsidiary of The Washington Post Company, which is a publicly traded corporation.

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STATEMENT OF THE CASE

A. Proceedings Below

Ayleen James ("James" or "Petitioner") filed a complaint in a New York federal court against Newsweek, Inc. ("Newsweek" or "Respondent") in 1996. Petitioner contended that she had been the victim of discrimination with regard to a variety of employment actions, including promotions, performance reviews and ultimately her termination, under seven different legal theories — race, color, age, sex, national origin, disability and retaliation. [App. A-5].[1] The district court granted summary judgment to Newsweek on each and every claim asserted by Petitioner.

On appeal to the Second Circuit, Petitioner abandoned all but one claim, proceeding only on her claim for retaliatory discharge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) ("Title VII"). The Second Circuit affirmed on the grounds that Petitioner did not establish a *prima facie* case of retaliation. Specifically, the court held, in a Summary Order, that Petitioner had not engaged in protected activity under Title VII when she told her supervisor that she did not believe her annual performance evaluation "was fair" and that she was "going to seek justice." [App. A-3]. It is from this judgment that Petitioner now seeks review.

B. Statement of the Facts

Petitioner was hired by Newsweek, publisher of the weekly news magazine *Newsweek*, in 1972 as a Researcher

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1. "App." refers to the Appendix to James' Petition for Writ of *Certiorari*.

(Editorial Assistant). [JA 75 ¶ 3].[2] In 1980, she was promoted to Writer/Researcher (Senior Editorial Assistant), the position she held until her discharge on December 10, 1994. [*Id.*]. At all times, Petitioner was covered by a collective bargaining agreement between Newsweek and the Newspaper Guild of New York (the "union"). [*Id.*].

Between 1992 and 1994, Petitioner sought a number of different positions at Newsweek. Her failure to receive the positions motivated her to file two charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"). On July 27, 1993, Petitioner filed a charge of discrimination with the EEOC and New York State Division of Human Rights ("NYSDHR") alleging that she was denied the position of Associate Editor/Lifestyle section in November 1992 and denied a bureau internship in May 1993 on the basis of race, ethnic background (non-WASP) and age ("Charge I"). [JA 324-25]. After an investigation, the NYSDHR issued a finding of "No Probable Cause" in August 1995. [JA 328-31].

On March 29, 1994, Petitioner filed a second charge of discrimination with the EEOC alleging that she was denied promotions in late 1993 to the positions of State Department Correspondent and Reporter/Nation and Lifestyle sections in retaliation for filing Charge I ("Charge II"). [JA 326]. After an investigation, the EEOC dismissed Charge II in July 1996, finding no violation of the discrimination laws. [JA 332].

Petitioner's discharge in December 1994 was the culmination of a long history of inadequate job performance

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2. "JA" refers to the Joint Appendix filed in the Court of Appeals.

and refusal to communicate with her superiors in a constructive manner about her work. In both 1985 and 1986, Petitioner was placed on probation by her supervisor, Annabel Bentley, due to her performance. [JA 674 ¶ 2; JA 678-81]. Between 1990 and 1993, Petitioner's work habits and attitude were the subject of numerous meetings and written communications with her supervisor at the time, Ted Slate. [JA 94-102, JA 119-143; JA 252-62; JA 709-26].

On June 1, 1994, Petitioner met with her new supervisor, Ann McDaniel, to discuss why she had not been selected for a writing internship for which she had applied. [JA 148 ¶ 22]. McDaniel also discussed why Petitioner had not been selected to attend the 1994 National Association of Black Journalists Conference. According to Petitioner, McDaniel told her she was not extended an invitation to the conference because of her "unsatisfactory" performance and a "lack of confidence in her ability to promote Newsweek, Inc." [JA 760].[3] Toward the end of this meeting, Petitioner spoke a few sentences in Spanish to McDaniel "just to get her reaction since she was Chief of Correspondents." [JA 301].

On July 21, 1994, Petitioner was advised in a meeting with McDaniel and others that she was being placed on probation due to unsatisfactory performance. [JA 77 ¶ 12].

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3. The district court concluded that since one of the functions of Newsweek attendees at the conference was to promote the magazine and recruit new minority employees, there were sound business reasons not to send an employee who was obviously unhappy about her employment at Newsweek and thus could not act effectively as a promoter and "good will ambassador." [JA 39-40; 744-45]. Based on these facts, the district court concluded that no inference of retaliation could reasonably be drawn from this event. [App. A-34–A-35].

Petitioner was also advised in writing that unless there was "substantial and sustained improvement," she was in "serious danger of being discharged." [JA 158]. Following the July 21 meeting, Petitioner's superiors attempted to meet with her on several occasions to review her performance, but Petitioner postponed each of the meetings. [JA 78 ¶ 15; JA 83; JA 150 ¶ 32; JA 166; JA 305-06].

McDaniel scheduled a meeting with Petitioner for December 9, 1994 to conduct Petitioner's annual performance review. [JA 151 ¶36]. Petitioner received a copy of the written review in advance of the meeting. [JA 151 ¶ 38]. The written review criticized Petitioner's performance and gave her a clear directive: "Now time is running out. You must continually perform basic research tasks properly and you must discuss your work in a constructive manner or your employment will be terminated." [JA 167-68]. The memo closed with the following: "As before, we continue to be available to you to help improve your performance. I have scheduled our next review session for . . . January 25." [*Id.*].

The review meeting was held on Friday, December 9, 1994 at 5:00 p.m., with McDaniel and her deputy, Jolie Solomon, and was tape recorded at Petitioner's request. [JA 170]. The transcript of the meeting, the accuracy of which Petitioner does not dispute, reflects that Petitioner interrupted McDaniel on numerous occasions, questioned McDaniel's credentials and ability to evaluate Petitioner, was openly mocking and disrespectful of McDaniel, and frequently interjected to discuss irrelevant matters. [JA 170-80].

At several points during the meeting, McDaniel expressed her view that the meeting was not a constructive conversation about Petitioner's work. [JA 170-80]. McDaniel concluded by referring to the final sentence of the written evaluation (prepared and given to Petitioner before the meeting) which indicated that another meeting had been scheduled for January 25. [*Id.*]. The meeting ended with Petitioner delivering a long statement about what she believed were some of her personal journalistic achievements. [*Id.*]. Petitioner left McDaniel's office and slammed the door. [*Id.*].

Following the conclusion of the Friday evening meeting, McDaniel advised Jean Barish, the Vice President of Human Resources, of what had transpired, in particular, her belief that, as in prior meetings, Petitioner had acted in a confrontational manner and was unwilling to accept the criticisms regarding her performance and engage in a constructive dialogue on the subject. [JA 79 ¶ 21; JA 152 ¶ 43].

The next morning, Saturday, December 10, 1994, Petitioner approached Solomon, whom Petitioner admits seemed frightened by her. [JA 368]. While Petitioner's summary judgment affidavit attempted to dispute Solomon's account of the discussion, at her deposition James testified that she had little, if any, recollection of what was said. [JA 314-20].

Solomon's report of the conversation to McDaniel included comments that Petitioner had made derogatory, threatening and insubordinate comments about McDaniel. [JA 193 ¶ 3; JA 153 ¶ 44]. McDaniel then spoke with Barish. [JA 79 ¶ 22; JA 153¶ 45]. After discussing the situation,

McDaniel and Barish believed that Petitioner's conduct that morning and the previous day (December 9), combined with her inadequate job performance over a long period of time, her refusal to engage in constructive discussions about her work and to accept and address their criticisms (conduct which had manifested itself again during the December 9 and 10 discussions), warranted termination. [JA 79 ¶ 22; JA 153 ¶ 45]. Later that day, McDaniel verbally informed Petitioner that her employment was being terminated. [JA 153].

SUMMARY OF ARGUMENT

The opinion of the Second Circuit Court of Appeals at issue here sets forth a rationale that is consistent with the holdings of other courts of appeals. Moreover, the decision is not in conflict with the Supreme Court authority cited by Petitioner as that authority has no application here. Consistent with the decisions of the Second Circuit and other judicial circuits, the court below properly construed Petitioner's statement that her performance review was not "fair" and that she was going to "seek justice" as too vague and ambiguous to support an inference that she was complaining about unlawful discrimination as required in order to maintain a *prima facie* case of retaliation under Title VII. There is no meaningful difference of opinion, much less a square conflict, among the circuits to warrant further review.

Petitioner's claim that the Second Circuit did not conduct an evaluation of the context in which she made her statement is simply wrong. In concluding that Petitioner's statement did not constitute protected activity for retaliation purposes, the court below found that Petitioner's employer could not

reasonably have understood that her statement about her performance review was directed at unlawful discrimination under Title VII.

REASONS FOR DENYING THE WRIT

I. THE COURT BELOW DID NOT IGNORE INTER-CIRCUIT OR SUPREME COURT AUTHORITY ON WHAT CONSTITUTES PROTECTED ACTIVITY IN TITLE VII RETALIATION CASES

While recognizing that informal complaints of discrimination can constitute protected activity for retaliation purposes under Title VII, the Second Circuit found, based on the specific facts of this case, that Petitioner's statements were simply too vague and ambiguous to support the inference that she was complaining about alleged discrimination. In reaching this conclusion, the Second Circuit did not, as Petitioner contends, "overlook[ ] inter-Circuit and Supreme Court authority requiring a full examination of the context of an employee's statements in determining whether she engaged in protected activity." [Pet. 6]. The "authority" relied on by Petitioner does not support this proposition and, moreover, has no application here.

For example, Petitioner relies on *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304 (6th Cir. 1989), and several cases from other circuit courts cited therein, for the proposition that "courts should balance the employee's right to protest discriminatory activity with the employer's entitlement to an efficient workplace." [Pet. 7]. While this is a correct statement of the law, it is irrelevant to the instant case. *Booker* and the authority cited therein address the issue,

not presented in this case, of when an employee's conduct in protest of an unlawful employment practice may lose its protected status because of the manner in which the protest is made. This assessment requires a balancing of the employee's right to protest discriminatory activity with the employer's entitlement to a non-disruptive workplace. This balancing or contextual analysis has nothing to do with the issue of whether the employee's protest was a complaint about alleged discriminatory employment practices — which is the issue in the instant case. In fact, the balancing discussed in *Booker* only occurs after a *prima facie* retaliation case has been established and the employer has offered the manner or effect of the protest as a legitimate, non-discriminatory reason for the adverse action. In contrast, the issue presented in the instant case is whether Petitioner's statements constitute protected activity sufficient to establish a *prima facie* case of retaliation.

Two other circuit cases relied on by Petitioner, *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008 (9th Cir. 1983) and *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981), do not advance Petitioner's case, but rather, support Newsweek's position here. In *Crown Zellerbach*, the Ninth Circuit held that a letter written by several black employees to a customer of their employer complaining about alleged "racism and discrimination" by their employer constituted opposition activity for retaliation purposes. The letter contained express references to alleged "racism" and "discrimination" at Crown Zellerbach Corporation. Thus, the question for the court was a narrow one: whether the letter complained of a specific employment practice. The court found that other parts of the letter, including particularized references to prior complaints about discriminatory employment practices, were sufficient to infer

that the employees were complaining not just about discrimination generally, but about an unlawful employment practice.

Similarly, in *Payne*, there was no question that the employee was protesting about his employer's alleged discrimination against blacks. The issue before the court was whether the protest concerned a discriminatory employment practice as opposed to the discriminatory treatment of customers. The court concluded that there was sufficient evidence in the record to conclude that the protests were aimed, at least in part, at the employer's alleged failure to provide adequate employment opportunities for blacks.

Crown Zellerbach and *Payne* stand in stark contrast to the instant case where Petitioner complained that her performance review was not "fair" and that she was going to "seek justice." Unlike the protests in *Crown Zellerbach* and *Payne*, Petitioner's protest made no reference to discrimination, racism or prior complaints or charges about same. Thus, unlike the protests in *Crown Zellerbach* and *Payne*, Petitioner's protests are simply too vague to constitute opposition to a discriminatory employment practice.

Petitioner's reliance on a series of Supreme Court First Amendment retaliation cases, *Connick v. Myers*, 461 U.S. 138 (1983), *Rankin v. McPherson*, 483 U.S. 378 (1987), and *Waters v. Churchill*, 511 U.S. 661 (1994), is also misplaced. *Connick* and *Rankin* address the unrelated question of when a public employee's speech addresses a matter of "public concern" for First Amendment purposes. In these cases, the context of the statement is critical to the often difficult assessment of whether the public employee is speaking as a

citizen upon matters of public concern or as an employee upon matters only of personal interest. *Connick*, 461 U.S. at 147-48.

In *Waters*, this Court addressed another First Amendment issue which also has no bearing on the instant case: who should determine whether an employee engaged in protected speech on a matter of public concern, the employer or a trier of fact. *Waters*, 511 U.S. at 668. This Court held that the inquiry should focus on what the employer reasonably thought was said by the employee. *Id.* at 677.

II. THE COURT BELOW APPLIED THE PROPER CASE LAW ON PROTECTED ACTIVITY

Contrary to Petitioner's assertion, the Second Circuit applied the proper legal authority in determining whether Petitioner engaged in protected activity. Notably absent from Petitioner's argument is the case upon which the Second Circuit principally relied — *Galdieri-Ambrosini v. National Realty & Development Corp.*, 136 F.3d 276 (2d Cir. 1998). In that case, the court held that a female employee did not complain about a discriminatory employment practice when she protested to company officials that two female colleagues were treated more favorably than she and that she was required to work on her male supervisor's personal business. *Id.* at 290-91. The employee contended that her complaints were about alleged gender discrimination, but the Second Circuit disagreed, finding that her protests did not advert to sex bias as a possible reason for the actions at issue and nothing in her protests could reasonably have led company officials to believe that she was complaining of bias. *Id.* at 292.

In holding that Petitioner, like the plaintiff in *Galdieri-Ambrosini*, did not engage in protected activity, the court below relied upon a critical passage from *Galdieri-Ambrosini*: " '[I]mplicit in the requirement that the employer have been aware of the protected activity is the requirement that it understood, or could reasonably have understood, that the plaintiff's opposition was directed at conduct prohibited by Title VII.' " [App. A-3–A-4] (quoting *Galdieri-Ambrosini*, 136 F.3d at 292). This very language suggests that the Second Circuit was applying a contextual analysis in assessing whether Petitioner's statements constituted protected activity.

Indeed, the court found the context of Petitioner's protest — receipt of a negative performance review — to be significant in ascertaining the meaning of her statement: "It cannot be expected that employees will be content with negative employment reviews, consider them just and take them lying down." [App. A-3]. This does not lead to the conclusion that an employee will file an EEOC charge because he is dissatisfied with a review. While Petitioner had filed two EEOC charges in the past concerning alleged discrimination in promotions, a fact noted by the Second Circuit, significant time had elapsed (nine months and a year and a half, respectively) since those filings. Further, Petitioner's statement about seeking justice could reasonably have referred to a number of different steps, having nothing to do with alleging discrimination, such as appealing the review to Human Resources or Newsweek's chief executive (steps she had taken on other occasions), protesting to her union representative or filing a grievance with her union under the collective bargaining agreement (which she did later concerning her discharge). [JA 80 ¶ 24; JA 84; JA 169]. Under these circumstances, and absent any reference by

Petitioner — directly or indirectly — that she was being treated unfairly for discriminatory reasons,[4] the Second Circuit was correct in concluding that Petitioner's "veiled and ambiguous remark is insufficient to support the inference that she was complaining about alleged discrimination." [App. A-3].

III. THE SECOND CIRCUIT'S DECISION WAS CONSISTENT WITH INTER-CIRCUIT AUTHORITY THAT VAGUE AND AMBIGUOUS STATEMENTS DO NOT CONSTITUTE PROTECTED ACTIVITY

In addition to *Galdieri-Ambrosini*, *supra*, upon which the Second Circuit relied, the decision of the court below is in agreement with other circuit court decisions finding that vague and ambiguous protests do not constitute protected activity for Title VII retaliation purposes. These cases include *Booker v. Brown & Williamson Tobacco Co.*, *supra*, a case upon which Petitioner relies. In *Booker*, a black employee contended that his letter to the head of human resources constituted a sufficient "charge" or "complaint" of discrimination and therefore was protected activity. The letter attempted to blame the employee's alleged performance problems on his supervisor. He asserted that remarks the employer had made about him were slanderous, that his subordinates had been forced to discredit him and that his supervisor when referring to black employees had

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4. As the Second Circuit noted, Petitioner not only failed to state that she was being discriminated against, but her statement also failed to indicate which of the many discrimination theories previously asserted by her (race, age, national origin, sex, or retaliation) was being alleged at this time. [App. A-3].

stated that "I don't know if these people can comprehend asset management." 879 F.2d at 1309. The letter also contested the company's complaints about his managerial style and claimed that the complaints about him were the result of "ethnocism." *Id.* at 1309.

The court concluded that the employee was not contesting any unlawful employment practice, but rather was contesting the correctness of a decision made by his employer. *Id.* at 1313. The court went on to state that even if by "ethnocism" the employee meant "discrimination,"

> . . . a vague charge of discrimination in an internal letter or memorandum is insufficient to constitute opposition to an unlawful employment practice. An employee may not invoke the protections of [the law] by making a vague charge of discrimination. Otherwise, every adverse employment decision by an employer would be subject to challenge under either state or federal civil rights legislation. . . . In our view, such would constitute an intolerable intrusion into the workplace.

Id.

Booker is consistent with the decisions of other circuit courts. *See, e.g., Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 511 & 513 n.4 (3d Cir. 1997) (letter written to company president by group of employees who had previously filed EEOC charges, containing general grievance about changes in working conditions, perceived threat to employees' job security and allegations that manager made derogatory comments about them, did not complain about discrimination

and thus did not constitute protected activity), *cert. denied*, 523 U.S. 1074 (1998); *Coutu v. Martin County Bd.*, 47 F.3d 1068, 1074 (11th Cir. 1995) (employee's written grievance concerning performance evaluation filed with county employer did not constitute protected activity where employee contended only that she worked hard and deserved better rating, notwithstanding prior allegation by employee of racial discrimination earlier in grievance process); *Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 701 (3d Cir. 1993) (letter written by employee to company's human resources department complaining about unfair treatment in general and belief that less qualified employee was awarded position sought did not constitute complaint of age discrimination for retaliation purposes under Age Discrimination in Employment Act); *Shapolia v. Los Alamos Nat'l Lab.*, 942 F.2d 1033, 1035 & 1035 n.1 (10th Cir. 1993) (general allegations that discharge was in retaliation for filing grievance based on receipt of negative performance evaluation insufficient to state claim under Title VII).

The cases above demonstrate that the analysis of the court below is consistent with authority in other circuits governing the interpretation of an employee's protests in Title VII retaliation cases.

CONCLUSION

For the reasons stated, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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